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No. ____

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.*,
and
NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals for the District of Columbia Circuit applied an illegal standard of review and unlawfully substituted its judgment for that of an administrative agency in overturning the Department of Transportation's rescission of its passive restraint requirement for automobiles.

PARTIES BELOW

There were two consolidated cases in the Court of Appeals. The parties below were as follows:*

1. *Civil Action No. 81-2220*

a. *petitioners*—State Farm Mutual Automobile Insurance Co., Kent Mason, Patricia Warren, and Leorlin Boyd;

b. *respondents*—Department of Transportation, Drew Lewis, as Secretary, National Highway Traffic Safety Administration; and Raymond A. Peck, Jr., as Administrator;

2. *Civil Action No. 81-2221*

a. *petitioners*—National Association of Independent Insurers, Automobile Owners Action Council, and Eugene J. Meyung;

b. *respondent*—National Highway Traffic Safety Administration;

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*Pursuant to Supreme Court Rule No. 19.4, these parties have been listed together in one caption on this petition for certiorari.

3. *Intervenors in Both Cases*

a. *in support of the insurance companies, et al.*—Albert B. Lewis, New York State Superintendent of Insurance;

b. *in support of the agency*—Automobile Importers of America, Inc., Consumer Alert** and Pacific Legal Foundation,** Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corp., Checker Motors Corp., Chrysler Corp., Ford Motor Co., General Motors Corp., and Volkswagen of America, Inc.

** Consumer Alert is a nonprofit organization incorporated in the District of Columbia, with headquarters in California. Consumer Alert has no parent companies, affiliates, or subsidiaries.

Pacific Legal Foundation is a nonprofit organization incorporated in California. Pacific Legal Foundation has no parent companies or subsidiaries, but it is affiliated with the College of Public Interest Law, a fellowship program for law school graduates.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Consumer Alert and Pacific Legal Foundation (PLF) respectfully request this Court to issue a writ of certiorari to review the opinion, judgment, and ensuing order of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The decision of the National Highway Traffic Safety Administration (NHTSA), a unit of the Department of Transportation (DOT), rescinding the passive restraint mandate is published in 46 Fed. Reg. 53,419 (Oct. 29, 1981), *reprinted in* the appendix to the petition for certiorari which has been separately filed by the Motor Vehicle Manufacturers Association, *et al.* (MVMA App.) at

88a. The opinion of the Court of Appeals overturning that decision is officially reported as *State Farm Mutual Automobile Insurance Co.* v. *Department of Transportation*, 680 F.2d 206 (D.C. Cir. 1982), MVMA App. at 1a. The order and supporting memorandum of the court, setting an effective date for the passive restraint mandate, have not been officially reported but is set forth in the MVMA Appendix at 79a.

JURISDICTION

The decision of the Court of Appeals was issued on June 1, 1982. On August 4, 1982, the court issued an order establishing September 1, 1983, as the effective date of the passive restraint mandate. Also on that date, the court denied NHTSA's motion, in which Consumer Alert and PLF had joined, for an extension of time in which to petition for rehearing. MVMA App. at 83a. No rehearing was sought in this case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 15 U.S.C. § 1394(a)(4).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the validity of NHTSA's decision to rescind its passive restraint mandate. Under that mandate, automatic front-seat occupant restraints would be required in all new cars, beginning with large and mid-size cars manufactured on or after September 1, 1982. The passive restraint mandate, as well as the decision to rescind it, was issued under the National Traffic and Motor Vehicle Safety Act of 1976, as amended, 15 U.S.C. §§ 1381, *et seq.*, MVMA App. at 163a. The regulation itself, Federal Motor Vehicle Safety Standard No. 208, is contained in 49 C.F.R. § 571.208 (1981); the amended

provisions appear at 46 Fed. Reg. 53,427 col. 2, MVMA App. at 120a.

DOT's decision was reviewed by the Court of Appeals pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.*, which is applicable to this proceeding under 15 U.S.C. § 1394(a)(3) and § 1410b(c)(2).

STATEMENT OF THE CASE

History of the Passive Restraint Mandate

The Motor Vehicle Safety Act authorizes DOT to promulgate safety standards aimed at reducing the human cost of traffic accidents. Under 49 C.F.R. § 501.2 (1981), this authority has been delegated to NHTSA.

NHTSA first issued a rule requiring passive restraints in cars in 1970. The impetus for this action was the low usage rate of conventional seat belts. Unlike such belts, which must be actively fastened before they are effective, passive restraints would, at least in theory, offer protection without the need for action by car occupants. NHTSA's passive restraint requirement, however, never took effect. After being amended several times, it was remanded by the Sixth Circuit for failing to meet the statutory requirement that safety standards be stated in objective terms. *Chrysler Corp.* v. *DOT*, 472 F.2d 659 (6th Cir. 1972).

The Sixth Circuit decision left standing another provision of the rule which required ignition interlocks in cars. These devices prevented a car's starting unless all of the front-seat occupants had buckled their belts. This rule aroused such strong public opposition that in 1974 Congress prohibited their requirement by NHTSA and also subjected any future nonbelt safety standard to congressional veto. 15 U.S.C. § 1410b; *see generally* the opinion below, 680 F.2d at 210-11, MVMA App. at 8a-9a.

The next major decision concerning the passive restraint mandate came in 1976, when Secretary of Transportation William T. Coleman, Jr., decided against requiring passive restraints due to the likelihood of adverse public reaction. Instead, he negotiated a large-scale demonstration program of passive restraints with four automobile manufacturers. Joint Appendix below (JA) at 2003. Four months after the Coleman decision, however, a new Secretary of Transportation, Brock Adams, reopened the issue, resulting in the demonstration program's early termination. *See, e.g., id.* at 2011, 2018. The rule subsequently issued by Secretary Adams in 1977 would have required front-seat passive restraints in new cars, beginning with large cars manufactured on or after September 1, 1981, and covering cars of all sizes by September 1, 1983. 42 Fed. Reg. 34,289 (1977).

At the time of Secretary Adams' decision, it was believed that the predominant means of compliance with the standard would be through air bags, which are inflatable cushions, stored in the steering column and dashboard of a car, designed to inflate in frontal collisions and thus protect the front-seat occupants. Because of the untested nature of these devices, and because Secretary Adams had decided, contrary to his predecessor, that public reaction was not a relevant issue, PLF challenged the rule in court. The rule was upheld, despite the disproportionate number of deaths which had occurred to date in air bag-equipped cars on the road. *Pacific Legal Foundation* v. *DOT*, 593 F.2d 1338, 1345 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979). The D.C. Circuit did, however, rule that public reaction had to be considered in establishing safety standards. 593 F.2d at 1345-46. Finally, even though Secretary Adams had "squarely rejected Coleman's view of the likely public reaction" (*id.* at 1342), the court upheld

the new Secretary because his disagreement with his predecessor was an issue of administrative judgment:

> "In the 1976 decision Secretary Coleman characterized his estimate of public resistance as 'a matter of judgment.' In our view Secretary Adams provided a sufficient explanation why his judgment differed from his predecessor's." 593 F.2d at 1346 (footnotes omitted).

The passive restraint issue was again reopened in 1981 by the new Secretary, Andrew Lewis, Jr. In April, 1981, Secretary Lewis issued a one-year postponement of the standard's first phase, so that the standard would not apply to any cars until September 1, 1982. 46 Fed. Reg. 21,172 (1981). The basis for the postponement was the unanticipated decline in the relative number of large cars being purchased, the fact that compliance with the standard would now be mostly by means of automatic seat belts rather than air bags, the likelihood of adverse consumer response, and the severe economic problems of the industry. A challenge to the one-year stay was dismissed by the D.C. Circuit. *Center for Auto Safety* v. *Lewis*, No. 81-1636 (D.C. Cir. July 2, 1981).

The Rescission of the Mandate

NHTSA issued its decision rescinding the passive restraint rule in October, 1981. NHTSA's decision rested largely on its view of consumer reaction. It determined that almost all cars manufactured under the mandate would comply by means of automatic belts rather than air bags. Because these belts would generally be detachable, there was no evidence that they would be used to any significantly greater extent than conventional belts. While several hundred thousand small-size cars equipped with automatic belts had been voluntarily purchased by the public in recent years and had shown a high rate of

belt usage, NHTSA found that it could not extrapolate from this experience to what would happen under a mandate. This was because: (1) the belt use rate in smaller cars *generally* is higher than average; (2) the automatic belts in these cars utilized features which made them nondetachable but which would not be utilized in cars manufactured under the mandate; and (3) these cars were purchased *voluntarily*. The behavior of people compelled to buy cars so equipped was likely to be quite different.

The Proceedings Below and the Basis for Federal Jurisdiction

The petitioners filed separate actions in the Court of Appeals in November, 1981, seeking review pursuant to 15 U.S.C. § 1394(a)(1). The cases were consolidated, and motions to stay; the rescission pending review were denied in December, 1981. 680 F.2d at 213, MVMA App. at 14a. On June 1, 1982, the court issued its opinion and judgment vacating NHTSA's decision and remanding the matter to the agency. On August 4, the court declared that the standard would take effect for all cars manufactured on or after September 1, 1983. MVMA App. at 80a.

REASONS FOR GRANTING THE WRIT

The Court of Appeals action will touch every person who sets foot inside a car. For many thousands of these people each year, the effect of the court's decision will quite simply be a matter of potential life or death. Yet the regulatory responsibility for the automotive safety of the public has been delegated by Congress not to the courts, but to DOT.

It is important to remember here what passive restraints are and what they are not. They are currently available in the form of automatic belts even in the ab-

sence of a government mandate, and several hundred thousand cars equipped with them have been sold to willing buyers. 680 F.2d at 215 n.12, MVMA App. at 18a-19a. They have been available in the past in the form of air bags, and the public rejected them. JA at 235. Public opposition to mandating the devices has been substantial. *See, e.g.*, 46 Fed. Reg. 53,429 col. 3, MVMA App. at 129a; JA at 2122 n.57. In the absence of a mandate, those people who supported it can purchase cars with automatic belts in any case, or they can buckle the seat belts they have now. Under a mandate, on the other hand, those opposed to it would have no choice but to pay for and live with it.

It was in this context that NHTSA decided not to impose passive restraints on the American public. As is shown below, the Court of Appeals' action, first in overturning NHTSA's decision and then in mandating these devices on its own, does not constitute judicial review of agency decision making. Rather, it is an outright usurpation of NHTSA's discretion and authority, and should be examined by this Court.

I

IN OVERRULING A REGULATORY DECISION OF NATIONAL IMPORTANCE, THE COURT OF APPEALS APPLIED A STANDARD OF REVIEW WHICH IS AS UNFOUNDED AS IT IS UNPRECEDENTED

The Court of Appeals did not question the established case law on judicial review of agency action. In accordance with numerous other decisions, the court stated that

> "[i]f the agency clearly articulates a reasonable basis for [its] action, we must defer to the policy judgments and expertise of the agency. By no means may we substitute the court's judgment . . . ." 680 F.2d at 229, MVMA App. at 48a.

This is fully consistent with the familiar rule that

> "[a]lthough [a court's] inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

Yet the court nonetheless had difficulty determining just what standard of review to apply. In its words, "[t]he appropriate scope of judicial review remains *the most troublesome question in this case* . . . ." 680 F.2d at 218, MVMA App. at 25a (emphasis added). As will be shown, this was not only the most troublesome question, it was the *key* question, for the court went on to declare that it was not the insurance companies but "*NHTSA* [which] has the burden of . . . showing that rescission of Modified Standard 208 was reasonable." 680 F.2d at 229, MVMA App. at 47a (emphasis added, footnote omitted).

That ruling, resulting in the reversal of NHTSA's decision, is simply incorrect.

A. The Court of Appeals Had No Basis for Deciding that the Passive Restraint Mandate Had Almost, But Not Quite, Been Endorsed by Congress

The basis for the court's reversal of the established burden of proof was its determination that Standard 208 had almost, but not quite, received congressional endorsement. The court stated:

> "Our review of the legislative history of the 1974 Amendments to the Safety Act and the subsequent congressional reaction to Modified Standard 208 suggests that the standard has come as close as an agency-made regulation can come to being affirmatively endorsed by Congress, without Congress actually having done so." 680 F.2d at 222, MVMA App. at 32a.

Having made this determination, the court was thus able to decide that the passive restraint mandate was *not*

a result of NHTSA's discretionary exercise of delegated power; rather, the mandate was the only permissible step down a supposed "path marked by Congress." 680 F.2d at 229, MVMA App. at 48a. NHTSA had not rescinded the mandate on the basis of informed administrative judgment, but had allegedly "arbitrarily veer[ed] from the course that Congress has set." 680 F.2d at 242, MVMA App. at 74a. In short, the decision to mandate passive restraints had been made not by NHTSA but by Congress, and it was NHTSA's unenviable burden to justify any deviation from that decision.

The Motor Vehicle Safety Act, however, contains no commandment that the Secretary promulgate a rule requiring passive restraints. It does not dictate the specific contents of any particular safety standard whatsoever. *See* 15 U.S.C. § 1392. Nor does the act command that a passive restraint mandate, once issued, may never be revoked. In its words, the "Secretary may by order amend *or revoke any* Federal motor vehicle safety standard established under this section." 15 U.S.C. § 1392(e) (emphasis added).

The Court of Appeals did not make its determination on the basis of the Safety Act, but on the basis of the legislative history of Standard 208. That legislative history, however, is an extremely long and convoluted one. The court's analysis of it takes up nearly seven full pages in the official *West Reporter*. *See* 680 F.2d at 222-28, MVMA App. at 32a-46a. What emerges from that discussion is no clearly marked "path" or "course" set by Congress, but a heated and continuing debate over the wisdom of mandated passive restraints.

The court's own description of the legislative history makes this clear. The court found that Standard 208 had "received sufficient congressional approval to raise doubts that NHTSA's rescission necessarily demon-

strates an effort to fulfill its statutory mandate." 680 F.2d at 222, MVMA App. at 32a-33a. But there were instances of congressional disapproval as well. In the court's own words, there were "*successful attempts as well as unsuccessful* attempts in Congress to control the evolution of the regulation." 680 F.2d at 209, MVMA App. at 4a (emphasis added). Whether one finds "sufficient congressional approval" or sufficient disapproval *all depends upon where one looks:*

1. When Congress banned mandated ignition interlocks in 1974, it also required that any future "nonbelt" safety standard could be promulgated only in accordance with specified provisions for public and congressional input and would still then be subject to congressional veto. 15 U.S.C. § 1410b; *see* 680 F.2d at 223, MVMA App. at 35a-36a. These requirements were evidently adopted as a compromise replacement for an amendment proposed by Congressman Wyman, which would have *prohibited* mandatory passive restraints and which the House of Representatives had "*passed overwhelmingly.*" 680 F.2d at 223, MVMA App. at 34a (emphasis added).

The 1974 enactments thus "sharply *reduced* DOT's discretion" to require passive restraints. *Id.* at 211, MVMA App. at 8a (emphasis added). They cannot be read as indicative of congressional approval for Standard 208; at best, they demonstrate that Congress was putting off any final decision on the issue. The court itself stated that, with this 1974 action, "Congress obviously anticipated that *a test* of the passive restraint standard *would come . . . on a later date.*" 680 F.2d at 223, MVMA App. at 35a (emphasis added). Had Congress believed at that time that it was approving the standard, however, there would have been no need for any "test" of it "on a later date."

2. In both 1978 and 1979, Congress enacted appropriation riders which "prohibited DOT from implementing the passive restraint standard in" 1979 and 1980, respectively. 680 F.2d at 212, MVMA App. at 11a. This legislation clearly demonstrated at least symbolic congressional disapproval of Standard 208. The court never made this observation, however (*see id.* at 212, 225, MVMA App. at 11a-12a, 38a), preferring instead to accentuate the positive. *See, e.g.*, the court's comment that "[o]ther congressional voices during this period were favorable, however." 680 F.2d at 225 n.24, MVMA App. at 38a-39a.

3. The court stated that "[i]n 1980, a majority of each house indicated support for the concept of mandatory passive restraints . . . ." 680 F.2d at 228, MVMA App. at 46a. The House vote on the measure in question was close, 209-192. *Id.* at 227, MVMA App. at 44a. Less than a year earlier, however, the House had voted "overwhelmingly, 320-73" in favor of the Stockman Amendment, which would have denied funds to enforce any restraint standard which did not allow purchasers to choose manual belts. *Id.* at 226, MVMA App. at 41a. This would have removed Standard 208's essential element of *mandatory* passive restraints.

The congressional actions described above clearly contradict the Court of Appeals' claim that "each time Congress reviewed the passive restraint standard it was essentially confirmed." 680 F.2d at 229, MVMA App. at 47a. Con[illegible]ss actually *enacted* only three measures dealing with [illegible]sue. One of these, the 1974 congressional veto provision, restricted DOT's discretion to promulgate the standard and was thus certainly not an endorsement of it. The other two enactments, the 1979 and 1980 appropriation riders, were *disaffirmations* of Standard

208. Only by ignoring these episodes, as well as the House passage of the Stockman Amendment, could the court conclude that the legislative history

> "suggests that the standard has come as close as an agency-made regulation can come to being affirmatively endorsed by Congress, without Congress actually having done so." 680 F.2d at 222, MVMA App. at 32a.

Even though Standard 208 was not vetoed by Congress, one could just as correctly replace the term "endorsed" with "repudiated" in this quote. This more than anything demonstrates the futility of attempting to discern some alleged "course that Congress has set" on the basis of th is labyrinthian legislative history.

B. Even Granting the Court of Appeals' Claim that Congress Had Almost, But Not Quite, Endorsed Standard 208, There Is Still No Justification for the Court's Reversal of the Burden of Proof in this Case

NHTSA's power to issue safety standards is not based on scattered indicia of unenacted congressional intent, but on a delegation of power which Congress *has* passed into law—the Motor Vehicle Safety Act. Within the bounds of reason, NHTSA's discretion to choose how to implement the objectives of that act is limited only by statutory constraints. Unenacted congressional intent is precisely that—unenacted. It cannot repeal or amend a statutory delegation. As this Court has pointed out, "[a]mendments by implication, like repeals by implication, are not favored." *United States* v. *Welden*, 377 U.S. 95, 102 n.12 (1964). Similarly, "indefinite congressional expressions cannot negate plain statutory language and cannot work a repeal or amendment by implication." *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 788 (1981).

The one function which congressional intent can have in this regard is to clarify the meaning of a statute. Legislative history may be examined by a court "in order to ascertain the intent of Congress as to the ultimate purpose" of a statute. *United States* v. *Wise*, 370 U.S. 405, 414 (1962). But this was not the purpose to which the Court of Appeals put the legislative history of Standard 208. That history, first of all, largely postdated the Motor Vehicle Safety Act and its amendments, and "*post hoc* legislative history is entitled to little weight." *Haire* v. *Calloway*, 526 F.2d 246, 249 n.4 (8th Cir. 1975), *vacated on other grounds*, 537 F.2d 318 (8th Cir. 1976). More importantly, the Court of Appeals was not even seeking to clarify any statutory ambiguity, because there was none. Instead, it was attempting to limit NHTSA"s statutory authority on the basis of some unenacted congressional reaction to the agency's exercise of that authority. But as was shown in the preceding section, this congressional reaction is as unclear and contradictory as it is complex. Even if one accepts the court's one-sided characterization of it, this reaction cannot restrict NHTSA's discretion because it does not amend the statutory delegation of power under which NHTSA operates.

Congress has enacted no requirement or endorsement of mandatory passive restraints. The bills that set out to do so all failed, and "unsuccessful attempts at legislation are not the best of guides to legislative intent." *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381 n.11 (1969). In this case, given the conflicting voices from Congress, these attempts are no guides whatsoever. Contrary to the court, Congress set no course on this issue. The "path marked by Congress" which the court claimed to discern (680 F.2d at 229, MVMA App. at 48a) is no more than a legislative trail

blazed by the court itself. This is not a judicial function, and it is not within the court's power to order NHTSA to follow that trail in lieu of its own administrative judgment.

II

THE COURT OF APPEALS ILLEGALLY RESTRICTED THE AGENCY'S DISCRETION AND USURPED ITS JUDGMENT BY REWEIGHING THE EVIDENCE

As the Court of Appeals noted, the standard of review applicable to this rule making is the "arbitrary and capricious" test. 680 F.2d at 218, MVMA App. at 25a. The court found that, in previous adjudications of Standard 208, this test as applied was similar to the "substantial evidence" standard of 5 U.S.C. § 706(2)(E) (*id.* at 219-20, MVMA App. at 26a-28a), and the court stated that it would apply this general standard. *See id.* at 228-30, MVMA App. at 46a-49a. In fact, however, the court proceeded to engage in its own reweighing of the evidence.

This Court has clearly stated that the substantial evidence test authorizes no such judicial intrusion. The fact that a court disagrees with an agency's view of the evidence does not justify supplanting the agency's conclusions:

> "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. [Citations omitted.]" *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

Congress intentionally chose to so limit the judicial role. In this Court's words,

> "Congress was very deliberate in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing the

> evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute." *Consolo*, 383 U.S. at 620 (footnotes omitted).

As is shown below, NHTSA's administrative expertise received little respect indeed from the court.

1. The court arbitrarily limited NHTSA's role to that of an accountant, whose sole function was to tote up the dollar figures involved and make a decision purely on the basis of which way the scale tipped. According to the court,

> "[t]he regulatory problem facing NHTSA was therefore simple in theory. . . . It had to predict the savings that would result from Modified Standard 208, and compare that savings with the cost of the standard, so as to conduct 'a commonsense balancing of safety benefits and economic cost.' [Citation omitted.]" 680 F.2d at 214-15, MVMA App. at 17a.

Such nonmonetary issues as equity and individual rights accordingly went out the window. NHTSA had made the inequity of a passive restraint mandate one of the bases for its decision:

> "Responsible regulatory policy should generally strive to ensure that the beneficiaries of regulation bear the principal costs of that regulation. . . . The automatic restraint requirements of the standard would have required the current regular user of manual belts not only to pay himself for a system that affords him no additional safety protection, but in part to subsidize the current nonuser of belts who may or may not be induced by the automatic restraints to commence regular restraint usage." 46 Fed. Reg. 53,424 col. 2, MVMA App. at 109a.

This issue, however, received practically no attention in the court's decision. The court referred to it twice in passing (680 F.2d at 217 and n.15, MVMA App. at 22a),

and then disposed of it in one sentence and a footnote (which consists of the court's own factual judgment as to what might happen to future insurance rates under the standard). *Id.* at 240 and n.43, MVMA App. at 70a.

The inequitable possibility that certain people, including seatbelt users, might pay with their lives for Standard 208 fared no better. It was NHTSA's judgment that safety would not be served "by imposing any requirement which would further complicate the extrication [in case of accident] of any occupant from his or her car, as some use-compelling features would." 46 Fed. Reg. 53,424 col. 3, MVMA App. at 110a. This was of no importance to the court, however, as long as there might be allegedly offsetting benefits to others under the standard:

> "There is no evidence to support the suggestion that 'further complicat[ing] the extrication' of occupants after collisions, if that occurs at all, *will not be more than offset* by the advantages of increased belt use." 680 F.2d at 236, MVMA App. at 61a-62a (emphasis added).

As was noted in *Pacific Legal Foundation*, "the Safety Act charges the Secretary with authority to balance present injuries against possible risks posed by safety equipment." 593 F.2d at 1346. The act does not so charge the court, yet the court here engaged in a task for which only NHTSA is qualifed and authorized.

2. The court similarly gave no deference whatsoever to the agency's treatment of the ignition-interlock fiasco. In NHTSA's view, both the public and the agency could ill afford to repeat such an experience, and the passive restraint mandate showed every indication of triggering it.

> "No regulatory policy is of lasting value if it ultimately proves unacceptable to the public. Public

> acceptability is at issue in any vehicle safety rulemaking proceeding in which the required safety equipment would be obtrusive, relatively expensive and beneficial only to the ext[illegible] that significant portions of the motoring public will cooperate and use it. Automatic belt requirements exhibit all of those characteristics." 46 Fed. Reg. 53,424 col. 1, MVMA App. at 107a.

Despite the fact that this issue of public acceptability is one uniquely within the agency's expertise, the court discarded NHTSA's discussion of it as "absolutely irrelevant," with "absolutely no evidence to support" it. 680 F.2d at 234, MVMA App. at 59a. Instead, the court wholeheartedly adopted the distinction between passive restraints and interlocks which former Secretary Adams had drawn. *See id.* at n.33, MVMA App. at 59a.

NHTSA's current view of the interlock experience is identical to that of former Secretary Coleman, who preceded Secretary Adams. Secretary Coleman decided not to mandate passive restraints because of the likelihood of adverse public reaction. As the court in *Pacific Legal Foundation* noted, "Coleman's view of the likely public reaction to passive restraints . . . *had been based largely on the ignition interlock episode* [footnote omitted]." 593 F.2d at 1342 (emphasis added). That view was "squarely rejected" by Adams (*id.*), *but this was "a matter of judgment" on which different administrators could come to different conclusions. See id.* at 1346 (emphasis added, citation omitted).

A new Secretary has now rejected the view taken by Secretary Adams. But according to the court, what was formerly a matter of judgment now suddenly is a matter of law. Once again, the agency's expertise was cast aside by the court.

3. In like manner, a number of other agency conclusions were overturned because the court came up with contrary reasoning or evidence. NHTSA determined that belt usage under the standard would be far below that found in the passive belt-equipped cars now on the road, in part because people who are compelled to buy these devices will be far less likely to use them than those who voluntarily purchased them. 46 Fed. Reg. 53,421 col. 3, MVMA App. at 98a. This is a commonsense finding which NHTSA was entitled to make, especially in light of the "extremely sparse factual data" before it. *Id.* at 53,423 col. 1, MVMA App. at 103a.

> "The Administrator may apply his expertise to draw conclusions . . . from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as 'fact,' and the like." *Ethyl Corp.* v. *Environmental Protection Agency*, 541 F.2d 1, 28 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

The court, however, labeled NHTSA's reasoning as "conjectural efforts" which "miss the point." 680 F.2d at 231, MVMA App. at 52a (footnote omitted). The court rejected "NHTSA's reasons for refusing to extrapolate from the available data," which consisted of car owner opinion surveys. *Id.* at n.30, MVMA App. at 52a. But, as the D.C. Circuit has previously declared, the discretion not to rely on such data "is peculiarly necessary where the expert evidence consists of the results of a public opinion poll—data that is open to a wide variety of errors." *United States* v. *Haldeman*, 559 F.2d 31, 64 n.43 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977) (upholding a trial court's rejection of such data). Here, however, the only allowable discretion was that of the court, not the agency.

Similarly, the court followed this same approach of picking and choosing its own evidence and reasons on

such issues as: why passive restraints are resisted by consumers;[1] whether the public has a widespread fear of being trapped by seatbelts;[2] and whether NHTSA was correct in viewing Standard 208 as a "people-forcing" statute—a view rejected by the court (*id.* at 240 n.43, MVMA App. at 70a) despite the fact that the mandate would have indeed literally forced people into being encircled by belts. And so on.

In short, while the court characterized NHTSA's decision as "a paradigm of arbitrary and capricious agency action" (680 F.2d at 208, MVMA App. at 4a), it itself engaged in paradigmatic judicial usurpation.

III

THE COURT'S SUDDEN AND UNEXPLAINED IMPOSITION OF STANDARD 208 CONTRADICTS ITS EARLIER DECISION AND SHOULD BE REVERSED

In its original decision, the court noted the "obvious problems associated with reversing NHTSA's action" and remanded the case for the agency "to recommend . . . a feasible schedule for completing analysis of [the remaining] questions." 680 F.2d at 240, 241, MVMA App. at 71a, 72a. The court "decline[d] the suggestions of petitioners that the standard take full effect by September 1983 . . . or by September 1982 . . . ." *Id.* at 241, MVMA App. at 72a (citations omitted).

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[1] The court formulated its own interpretation of the regulatory analysis performed by NHTSA's staff. *See* 680 F.2d at 232 n.30, MVMA App. at 53a.

[2] Because the court differed with NHTSA over the implications of an underlying survey, it decided that "[c]onsiderable doubt exists about the strength of this finding. [Footnote omitted.]" 680 F.2d at 235 and n.34, MVMA App. at 60a-61a.

In its Order of August 4, 1982, however, the court decreed that Standard 208 would take effect on September 1, 1983. Memorandum Opinion at 1, MVMA App. at 81a. The court neither acknowledged nor explained this contradiction of its June decision.

Despite the court's characterization of itself, DOT, and Congress as "partners" (680 F.2d at 242, MVMA App. at 74a), there are still certain bounds between the judicial and administrative functions which a court can cross only under the most extreme circumstances, if at all. The court originally remanded the standard to NHTSA. It issued no requirements which NHTSA failed to meet, and it set no deadlines to which NHTSA failed to adhere. It should not now be allowed to suddenly impose a regulation of this scope as if its prior remand had never existed. As this Court has stated, there is

> "well-established authority to the effect that, absent extraordinary circumstances, 'the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.' " *Federal Communications Commission* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 792 n.15 (1978), *quoting Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

In this case, the only "extraordinary circumstance" is the court's unexplained reversal of itself. Regardless of what action this Court takes on the merits of this case should this petition be granted, the Court should reverse this summary judicial imposition of Standard 208.

CONCLUSION

The Court of Appeals' reversal of NHTSA's decision is unprecedented in manner. On a matter which will touch the lives of all Americans, the court has placed the burden of proof in this proceeding not on those challenging the agency's decision, but on NHTSA itself. It has done so on the basis of no congressional enactment whatsoever, but rather by claiming to discern a congressional endorsement in the vagaries of a legislative history which suggests, if anything, that Congress has *disapproved* of mandatory passive restraints.

There is no justification for the regulatory role which the court assumed in imposing these devices on the public. For this reason, and for the other reasons set forth above, a writ of certiorari should be issued to review the Court of Appeals' action.

Respectfully submitted,

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No. 82-355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.*,
and
NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

In opposing Supreme Court review of this case, respondents uniformly attempt to downplay the standard of review applied by the court of appeals below. They also uniformly characterize the passive restraint mandate as a long-standing agency policy which the National Highway Traffic Safety Administration (NHTSA) has allegedly abandoned in an unprecedented turnabout. Their approach could not be more unfounded.

I

IN CLAIMING THAT THE COURT OF APPEALS "BROKE NO NEW GROUND" WHEN IT OVERTURNED NHTSA'S DECISION, RESPONDENTS ATTEMPT TO MAKE A MOLEHILL OUT OF A MOUNTAIN

Respondents all argue that the court of appeals did no more than apply the traditional standard of review in overturning NHTSA. The National Association of Independent Insurers, *et al.* (NAII), claims that the opinion below "broke no new ground" and "did not announce a new principal *[sic]* of judicial review." NAII Opposition (Opp.) at 6, 8. The State Farm Mutual Automobile Insurance Company, *et al.* (State Farm), similarly contends that the court "applied the traditional standard for review" and engaged in "no . . . shifting of the burden in this case." State Farm Opp. at 8, 13; *see also* New York Superintendent of Insurance (New York) Opp. at 2. State Farm even has statistics to support this contention; according to it, the court employed the proper terminology of the arbitrary and capricious test "[n]o less than eight times." State Farm Opp. at 9.

In fact, NAII had explicitly argued below that the burden of proof should be shifted to NHTSA, and that is precisely what the court of appeals did. NAII had contended that

> "[t]he burden is on NHTSA, *and it is a heavy one*, to explain how [its] action is legal, rational and supported by substantial evidence." NAII Brief at 19 (D.C. Cir. Dec. 28, 1981) (emphasis added).

The court of appeals agreed. It took the heated and continuing congressional debate over passive restraints and made that its basis for an unprecedented standard of almost-but-not-quite congressional approval. In the

court's words, the congressional reaction to the passive restraint mandate

> "suggests that the standard has come as close as an agency-made regulation can come to being affirmatively endorsed by Congress, without Congress actually having done so." Opinion below, 680 F.2d 206, 222 (D.C. Cir. 1982), *reprinted in* Motor Vehicle Manufacturers Association Appendix (No. 82-354) (MVMA App.) 1a, 32a.

On the basis of this almost-but-not-quite standard, the court proceeded to place the burden of proof on NHTSA rather than on those challenging the agency:

> "It follows that NHTSA has the burden of explaining why it has changed course, and of showing that rescission . . . was reasonable." 680 F.2d at 229, MVMA App. at 47a (footnote omitted).

For the reasons previously set forth in our petition for certiorari, we submit that the court of appeals misread the congressional reaction and misused it in reviewing NHTSA's action. Petition for Writ of Certiorari at 7-14. However, regardless of one's view on this, it is unquestionable that the court utilized this congressional reaction to limit NHTSA's discretion[1] and to shift the burden of proof.[2] This resort to unenacted congressional reaction to

---

[1] The court expressly rejected any suggestion "that the congressional actions and failures to act described above have no bearing on the agency's freedom to regulate on this question." 680 F.2d at 229, MVMA App. at 47a.

[2] The court explicitly tied both the level of judicial review and the burden of proof to the "path" which it claimed had been set for NHTSA by Congress:

> "Judicial scrutiny of agency action . . . depends on the extent to which the agency has deviated from congressional expectations. An agency is seldom locked on course, but it must have increasingly clear and convincing reasons the more it departs from the path marked by Congress." 680 F.2d at 229, MVMA App. at 48a.

restrict an unambiguous statutory delegation of authority is apparently without precedent; neither the court nor State Farm nor NAII nor anyone else has cited a single other case in which some almost-but-not-quite congressional approval has been put to this use, or for that matter to any use whatsoever.

Contrary to respondents' claims, there is nothing that is either "traditional" (State Farm Opp. at 8) or "typical" (NAII Opp. at 6) about the standard of review applied by the court of appeals. Perhaps it is true that, as State Farm claims, the court used the phraseology of the arbitrary and capricious test "[n]o less than eight times" in its decision. State Farm Opp. at 9. If that is so, then the court's repetitiveness in this regard does not support respondents' argument, but rather suggests an adage of Ralph Waldo Emerson: "The louder he talked of his honor, the faster we counted our spoons." The court's incantation of the arbitrary and capricious standard is no cure for the court's failure to apply it. The standard which the court actually used is so unprecedented as to warrant this Court's review.[3]

---

[3] Contrary to NAII's suggestion (NAII Opp. at 6 n.8), the validity of the court's action cannot be judged by examining the standard of review applied by the judges below in *other* cases. The general competence of the judges is not at issue here, and NAII is grasping at straws when it attempts to introduce this subject.

II

CONTRARY TO RESPONDENTS' ASSERTIONS, THE HISTORY OF THE PASSIVE RESTRAINT MANDATE SUPPORTS THE AGENCY'S RIGHT TO RESCIND THAT RULE

The court's assessment that "NHTSA is not writing on a clean slate" played an essential role in its review of the agency's decision. 680 F.2d at 229, MVMA App. at 47a. Respondents go to considerable lengths to support this characterization. State Farm describes NHTSA's action as "the reversal of a long-standing agency rule" and the abandonment of "NHTSA's 12-year affirmation of the efficacy of passive restraints." State Farm Opp. at 11, 10-11. NAII refers to the "dozen years of relevant history" behind the passive restraint mandate (NAII Opp. at 8), and New York claims that NHTSA "is attempting to ignore ten years' administrative history." New York Opp. at 4.

Unfortunately, all of these characterizations omit one very important and very inconvenient fact. The passive restraint mandate which NHTSA rescinded is neither a dozen years old, nor ten years old, nor even five years old. It was issued in 1977. Its promulgation "reversed a prior policy" against requiring passive restraints that was set in 1976. *Pacific Legal Foundation* v. *Department of Transportation*, 593 F.2d 1338, 1343 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979). The 1976 policy, in turn, replaced a 1972 rule which had "foundered both in the courts and in Congress." *Id.* at 1341.

In short, the lineage of the passive restraint mandate is, like many genealogical assertions, quite a bit less than that claimed by its proponents. The slate upon which NHTSA has written may not be clean, but it has been erased often enough to dispel the notion that the passive

restraint mandate is imbued with historical necessity. Shorn of respondents' revisionism, the history of the passive restraint issue supports rather than undercuts NHTSA's right to act as it did.

CONCLUSION

For these reasons, and for the other reasons set forth in the petitions in this case and in Case Nos. 82-354 and 82-398, the decision of the court of appeals should be reviewed by this Court.

Respectfully submitted,

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October 29, 1982

No. 82-355-CFX
Status: GRANTED

Title: Consumer Alert, et al., Petitioners
v.
State Farm Mutual Automobile Insurance Co., et al.

Docketed:
August 30, 1982

Court: United States Court of Appeals for the District of Columbia Circuit

Vide:
82-354
82-398

Counsel for petitioner: Kezmen, Sam

Counsel for respondent: Solicitor General, Perlik, William R., Fitzpatrick, James F., Rosenberger, Raymond J., Hammer, Robert S.

Entry	Date	Note	Proceedings and Orders
1	Aug 30 1982	G	Petition for writ of certiorari filed.
3	Sep 14 1982		Order extending time to file response to petition until October 8, 1982.
4	Oct 8 1982		Brief amicus curiae of Amer. College of Preventive Medicine, et al. filed. VIDED.
5	Oct 8 1982	G	Motion of Automotive Occupant Protection Association for leave to file a brief as amicus curiae filed.
6	Oct 8 1982		Brief of respondent Nat. Assn. of Independ. Ins. in opposition filed. VIDED.
7	Oct 8 1982		Brief of respondent St. Farm Automobile Ins., et a in opposition filed. VIDED.
8	Oct 12 1982		Order further extending time to file response to petition until October 20, 1982.
9	Oct 20 1982		DISTRIBUTED. November 5, 1982
10	Oct 21 1982	X	Brief of respondent Supt. of Insurance of NY in opposition filed. VIDED.
11	Oct 29 1982	X	Reply brief of petitioner Consumer Alert et al. filed.
12	Nov 8 1982		Petition GRANTED. The cases are consolidated and a total of one hour is allotted for oral argument.
13	Nov 8 1982		Motion of Automotive Occupant Protection Association for leave to file a brief as amicus curiae GRANTED.
15	Dec 22 1982		Order extending time to file brief of petitioner on the merits until January 7, 1983.
16	Dec 23 1982		Brief of petitioners Consumer Alert et al. filed. VIDED.
17	Dec 23 1982		Brief of respondent Motor Vehicle Mfg., et al. filed. VIDED.
18	Dec 23 1982		Joint appendix filed. VIDED.
19	Jan 7 1983		Brief of respondent Federal Parties filed. VIDED.
20	Jan 19 1983	S	Motion of respondents for divided argument filed.
21	Jan 21 1983	S	Motion of the Solicitor General for divided argument filed.
22	Jan 21 1983	S	Motion of petitioners in No. 82-355 for divided argument filed.
23	Feb 4 1983		Brief amicus curiae of Auto. Occupant Protection Assn filed. VIDED.
24	Feb 7 1983		Brief of respondents St. Farm Automobile Ins., et al. filed. VIDED.
25	Feb 7 1983		Brief amicus curiae of Amer. College of Prev. Medicine, et [illegible]

No. 82-355-CFX

Entry	Date	Note	Proceedings and Orders
			al. filed. VIDED.
26	Feb 7 1983		Brief of respondents Nat. Assn. of Independ. Ins., et al. filed. VIDED.
27	Feb 7 1983		Brief amicus curiae of Epilepsy Fndn. of Amer., et al filed.
28	Feb 7 1983		Brief amicus curiae of Amer. Insurance Assn. filed. VIDED.
29	Feb 7 1983		Brief amicus curiae of Natl. Assn. of Insurance Comm filed. VIDED.
30	Feb 7 1983		Brief amicus curiae of Mothers Against Drunk Drivers filed. VIDED.
31	Feb 7 1983		Brief amicus curiae of Center For Auto Safety, et al. filed. VIDED.
32	Feb 9 1983		Brief of respondent Supt. of Insurance of N.Y. filed. VIDED.
33	Feb 22 1983		Motion of respondents for divided argument DENIED.
34	Feb 22 1983		Motion of the Solicitor General for divided argument GRANTED.
35	Feb 22 1983		Motion of petitioners in No. 82-355 for divided argument DENIED.
36	Feb 22 1983		Record filed.
37	Feb 22 1983		Certified original record (BOX) received.
38	Mar 24 1983		SET FOR ARGUMENT Tuesday, April 26, 1983. (1st case) The case is consolidated with Nos. 82-354 & 398. (1 hr)
39	Mar 24 1983		CIRCULATED.
40	Apr 19 1983	X	Reply brief of petitioner Consumer Alert et al. filed. VIDED.
41	Apr 19 1983	X	Reply brief of respondent Motor Vehicle Mfg., et al. filed. VIDED.
42	Apr 19 1983	X	Reply brief of respondent United States filed. VIDED.
43	Apr 26 1983		ARGUED.